In the District Court of the United States for the Southern District of New York

CIVIL ACTION NO. 18-116

MCLEAN TRUCKING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, McLean Trucking Company, Inc., The Secretary of Agriculture of the United States and American Farm Bureau Federation submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decree of the District Court entered in this cause on the 28th day of December 1942. A petition for appeal was filed on February 23, 1943, and is presented to the District Court herewith, to wit, on the 23rd day of February 1943.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decree entered in this

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cause is conferred by Section 210 of the Judicial Code, as amended, 36 Stat. 539, 540, 1087, 1150, 38 Stat. 208, 220 [Urgent Deficiencies Act of October 22, 1913], (28 U. S. C. 47a) and Section 238 of the Judicial Code, as amended, 43 Stat. 936, 938. (28 U. S. C. 345).

The following cases sustain the jurisdiction of the Supreme Court to review by direct appeal the decree entered in this cause: *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 78; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 477; *Alton Railroad Co.* v. *United States,* 315 U. S. 15, 16–17; *Georgia Public Service Co.* v. *United States,* 283 U. S. 765, 769; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 279 U. S. 768, 770; *B. & O. Railroad Company* v. *United States,* 279 U. S. 781, 784–5; *New England Divisions Case,* 261 U. S. 184, 188–9.

STATUTES INVOLVED

The statutes involved are Section 5 of the Interstate Commerce Act, as amended by the Transportation Act of September 18, 1940, 54 Stat. 898, 905–910 (49 U. S. C. 5); the National Transportation Policy set forth in the said Act, 54 Stat. 899; Sections 1 and 2 of the Sherman Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1–2); and Sections 7 and 10 of the Clayton Act of October 15, 1914, 38 Stat. 730, 731–2, 734 (15 U. S. C. 18, 20). The pertinent provisions of these statutes are set forth in the Appendix hereto.

THE ISSUES AND THE RULING BELOW

In a proceeding under Section 5 of the Interstate Commerce Act, the Interstate Commerce Commission on March 16, 1942, made an order authorizing and approving a proposed merger of certain common carriers by motor vehicle into a single company, Associated Transport, Inc. The merger includes the principal motor carriers operating along the Atlantic seaboard. Substantial competition among these carriers would be eliminated by the merger. The new company, Associated Transport, Inc., will be the largest common carrier of property by motor vehicle in the United States. It will have operating revenues ten times greater and a route mileage six times greater than any other motor carrier in the area where it operates. It will have no single competitor throughout that territory. It will have routes extending over 24,338 highway miles from New York and Massachusetts, on the north, to Louisiana and Florida, on the south. Kuhn, Loeb & Company (who have been for many years and still are bankers for the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company, two rail carriers operating in the territory of the motor carriers involved in the merger) through a wholly owned subsidiary, The Transport Company, is a stockholder, and at the time of the hearing before the Commission had representation on the Board of Directors of Associated Transport, Inc.

In the proceedings before the Commission, the application for approval of the merger was opposed by the Secretary of Agriculture of the United States, the Antitrust Division of the United States Department of Justice, the National Grange, the National Industrial Traffic League, Super Service Motor Freight Company, Virginia State Horticultural Society, Inc., West Virginia State Horticultural Society, Maryland State Horticultural Society, Berks-Lehigh Mountain Fruit Growers, Inc., Appalachian Apple Service, Inc., and American Farm Bureau Federation.

The plaintiff, McLean Trucking Company, Inc., a motor carrier which competes in part of the territory involved with some of the defendant carriers included in the merger, brought suit in the District Court to set aside the Commission's order. As provided by Sections 208 and 211 of the Judicial Code (28 U. S. C. 46, 48) the United States was made a defendant. In the District Court the United States confessed error. The Secretary of Agriculture of the United States and the American Farm Bureau Federation intervened as plaintiffs. The Interstate Commerce Commission and the parties to the merger defended the Commission's order.

It was contended in the District Court that the order of the Commission was invalid for the following reasons:

(1) The Commission in finding under Section 5 (2) (b) of the Interstate Commerce Act that the merger of motor carriers was "consistent with the public interest," erred in that it applied the standards and criteria applicable to the merger of rail carriers under the Transportation Act of 1920, instead of applying the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers.

(2) The Commission erred in approving the merger without making a finding that its effect would not be inconsistent with the National Transportation Policy (as stated in the Transportation Act of 1940) to preserve the inherent advantages of motor transportation.

(3) The Commission, in making its finding as to whether the merger would "be consistent with the public interest," improperly failed to consider the policies and provisions of the antitrust and other laws of the United States.

(4) The Commission erred in concluding that Section 5 (11) of the Act, which provides that carriers participating in a merger approved by the Commission in accordance with the provisions of the Act are relieved from the prohibitions of the antitrust and other laws in so far as necessary to enable them to carry into effect the merger so approved, relieved the Commission from the requirement of considering the policies and provisions of the antitrust and other laws of the United

States in making its finding as to whether the merger would "be consistent with the public interest."

(5) The Commission erred in approving a merger involving the elimination of substantial competition without making a finding that the existing motor carrier services are inadequate.

(6) The Commission erred in approving the merger without making a finding, in accordance with the provisions of Section 5 (2) (c) (1) of the Act, as to the effect of the merger upon adequate transportation service to the public.

(7) There was no substantial evidence to support the Commission's finding that Associated Transport, Inc., through its relationship with Arrow Carrier Corporation, The Transport Company and Kuhn, Loeb & Company, was not affiliated with the Pennsylvania Railroad Company and the Baltimore & Ohio Railroad Company within the definition in Section 5 (6), and therefore not subject to the proviso of Section 5 (2) (b) of the Act; that in the absence of such evidence, the Commission erred in failing to make the findings, as required by Section 5 (2) (b), that the merger would enable carriers by railroad to use service by motor vehicle to public advantage in their operations and would not unduly restrain competition.

(8) The findings of the Commission were not supported by substantial evidence.

On December 28, 1942, the District Court entered its final decree dismissing the complaint, and denying the injunction prayed for by plaintiffs. The District Court held that the Commission's order was based on substantial evidence, was made in accordance with the applicable law, and was valid. The opinion of the Court together with its Findings of Fact and Conclusions of Law is set forth in the Appendix hereto.

The District Court held that it would consider the case as if Arrow Carrier Corporation had never been a party to the merger. The Commission, however, by its order of March 16, 1942, approved the transaction which permitted the inclusion of Arrow Carrier Corporation. An important issue was thereby presented as to the validity of the order of the Commission in view of the provisions of the Transportation Act of 1940 (Section 5 (2) (b) proviso) arising out of the domination of Arrow Carrier Corporation by Kuhn, Loeb & Company through its wholly owned subsidiary, The Transport Company. The entry of a supplemental order by the Commission following the institution of the suit in the District Court vacating its order of March 16, 1942, to the extent that it authorized the inclusion of Arrow Carrier Corporation, reduced the stock interest of Kuhn, Loeb & Company in Association Transport, Inc., but, as plaintiffs contended, did not

render moot the important public questions arising under Section 5 (2) (b) proviso.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of public importance. Review by the Supreme Court is desirable, not only because of the magnitude of the contemplated merger and its effect upon the national economy, but also because of the complexity and far-reaching import of the novel questions of law and statutory questions involved.

The effect of the decision of the District Court is that the Commission in considering mergers of motor carriers need not take into consideration the national transportation policy as announced in the Transportation Act of 1940; need not apply the standards and criteria prescribed by the Transportation Act of 1940 governing mergers of motor carriers; need not consider the antitrust laws in determining whether the merger of motor carriers is in the public interest; need not consider the effect of mergers of motor carriers upon adequate transportation service; and need not consider in approving mergers of motor carriers whether existing motor carrier services are inadequate.

The court failed to consider the Commission's interpretation of the provision of the Transportation Act of 1940 designed to prevent railroad domination and control of motor carriers, which involves questions of far-reaching public importance.

These are questions which have not been, but should be decided by the Supreme Court.

Respectfully submitted.

E. B. USSERY,
E. B. Ussery,
Counsel for McLean Trucking Company, Inc.

ROBERT H. SHIELDS,
Robert H. Shields,
Solicitor of the United States Department of Agriculture, Counsel for the Secretary of Agriculture of the United States.

KIRKPATRICK, MATHIAS & MELOY,
By PAUL E. MATHIAS,
Kirkpatrick, Mathias & Meloy,
Counsel for American Farm Bureau Federation.

APPENDIX

INTERSTATE COMMERCE ACT

(54 Stat. 898, 905–910)

SEC. 5 * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

* * * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that,

subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transactions; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope

of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, * * *

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any

control or franchises acquired through said transactions without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

NATIONAL TRANSPORTATION POLICY

(54 Stat. 899)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transporta-

tion and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof, and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SHERMAN ACT

(26 Stat. 209)

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT

(38 Stat. 730, 731–2, 734)

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempt-

ing to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That noth-

ing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

* * * * *

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to pre-

vent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

United States District Court for the Southern District of New York

Civil Action Nos. 18–116

McLEAN TRUCKING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

Before CHASE, C. J., WOOLSEY and MANDELBAUM, D. JJ.

Action by the McLean Trucking Company, Inc., against the United States to enjoin and set aside an order of the Interstate Commerce Commission granting petitions for the authorization of the merger of certain interstate carriers by motor vehicle and the approval of the issuance of securities in connection therewith.

Davies, Auerbach, Cornell & Hardy, Attorneys for plaintiff; E. B. Ussery, Orrin G. Judd and Charles V. Guthrie, of counsel.

Thurman Arnold, Assistant Attorney General Arne C. Wiprud, William R. Kueffner, Charles S. Collier, Sp. Assistants to the Attorney General; John H. D. Wiggee, David G. MacDonald, Sp. Attorneys Mathias F. Correa, U. S. Attorney, for United States.

Daniel W. Knowlton, Counsel for Interstate Commerce Commission.

Ralph F. Koebel, Attorney for Secretary of Agriculture.

Kirkpatrick, Mathias & Meloy, Attorneys for American Farm Bureau Federation.

Nordlinger, Riegelman, Cooper & Benetar, Attorneys for defendants, Mortimer A. Sullivan, of Counsel.

CHASE, Circuit Judge:

This action was brought by the plaintiff, a common carrier by motor vehicle within part of the territory in which the defendant motor carriers, or some of them, operate, against the United States of America and the Interstate Commerce Commission, Associated Transport, Inc., Arrow Carrier Corporation, Barnwell Brothers Incorporated, Consolidated Motor Lines Incorporated, Horton Motor Lines Incorporated, McCarthy Freight System, Inc., M. Moran Transportation Lines, Inc., Southeastern Motor Lines Incorported, Transportation Incorporated, The Transport Company, Kuhn Loeb & Company, Barnwell Warehouse & Brokerage Company, Brown Equipment & Manufacturing Company, Conger Realty Company, and Southern New England Terminals, Inc., under the Urgent Deficiencies Act (38 Stat. 129, 210; 28 U. S. C. A. Secs. 45 and 47a) to enjoin and set aside an order of the Interstate Commerce Commission which authorized the merger of the defendants who are carriers by motor vehicle and the issuance of securities in connection therewith. It was heard by a court of three judges pursuant to the statute.

The principal issues are (1) whether the findings of the Commission are supported by the evidence and (2) if so, whether the Commission's order was erroneous because it resolved the questions presented by the standard of what it determined was adequate transportation facilities in

the public interest under the criteria prescribed in the Interstate Commerce Act without deciding that its order would not result in a consolidation that would violate the provisions of either the Sherman, or the Clayton Act, as those acts have been construed generally.

The proceedings before the Commission were instituted by Associated Transport, Inc., a Delaware corporation which was organized for the purpose of bringing about the proposed merger and which was not then engaged in the transportation business. The carriers by motor vehicle it was proposed to merge operated as common carriers on regular routes and one or more of them served communities in Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Ohio, New Jersey, Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, and Louisiana.

There were two petitions which were consolidated for hearing. The first was by Associated Transport, Inc., for authority under Sec. 5 of the Interstate Commerce Act (1) to obtain control through the purchase of their capital stock of the following eight common carriers by motor vehicle: Arrow Carrier Corporation, Paterson, N. J.; Barnwell Brothers Incorporated, Burlington, N. C.; Consolidated Motor Lines Incorporated, Hartford, Conn.; Horton Motor Lines Incorporated, Charlotte, N. C.; McCarthy Freight System, Inc., Taunton, Mass.; M. Moran Transportation Lines, Inc., Buffalo, N. Y.; Southeastern Motor Lines Incorporated, Bristol, Va., and Transportation In-

corporated, Atlanta, Ga. and (2) to consolidate into a unit for operation by itself the properties and rights to operate of the named carriers within one year from the date it should acquire the control of them. The second application was for authority to issue preferred and common stock to obtain funds needed to acquire the control of the named carriers and four associated noncarriers viz, Barnwell Warehouse & Brokerage Company, Burlington, N. C.; Brown Equipment & Manufacturing Company, Charlotte, N. C.; Conger Realty Company, Charlotte, N. C., and Southern New England Terminals, Inc., Taunton, Mass.

The Antitrust Division of the Department of Justice, the Secretary of Agriculture, four fruit growers associations and Super Service Freight Company, a common carrier by motor vehicle, intervened and opposed the applications. There were other intervenors who, however, stood indifferent except the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America which at the close of the hearings supported the applications.

A previous application by another petitioner for authority to unify by means of a holding company set-up twenty-nine common carriers by motor vehicle which included the eight already named had been denied and these applications were the result of the desire of the petitioner and the eight operators involved to avoid the defects in the first application which had led to its denial largely on the ground that the then proposed unification was not economical in that it would permit two or more carriers under common control to engage in

duplication of service over most of the routes in the greater part of the territory affected.

In the instant proceedings there were extensive hearings before an examiner at which a large amount of evidence was introduced. After his proposed report was duly served on the parties, the intervenors who opposed the applications filed objections which were argued before the Commission which after due consideration made the order now under attack.

The Commission made findings on what the record shows was adequate supporting evidence that the proposed consolidation would bring about economies and greater effieiency in operation; improvement in service; leave ample competitive motor vehicle carrier service in the territory affected; and be in the public interest within Sec. 5 of the Interstate Commerce Act.

After the suit was brought and the answer of the Commission was filed it was amended to allege, what is now undisputed, that because of the failure to carry through negotiations for the acquisition of the stock of the Arrow Carrier Corporation the applicant petitioned the Commission for a modification of its order to exclude that carrier from the merger authorized and that was done by order entered June 8, 1942. All phases of this controversy which resulted from the inclusion of Arrow in the authorized consolidation are, therefore, eliminated and we will proceed as though Arrow had never been a party.

The United States answered by confessing error and praying for a decree setting aside the Commission's order. The other defendants answered

joining issue and praying that the complaint be dismissed. Their right so to do was not affected by the confession of error by the United States and the issues thus raised are still open. 28 U. S. C. A. sec. 45 (a); *Interstate Commerce Commission* v. *Oregon-Washington R. R. Co.* 288 U. S. 14.

As we have found that the evidence was sufficient to support the findings of the Commission our further review must be confined to determining whether the order is in conformity to the applicable law. *Virginian Ry.* v. *United States,* 272 U. S. 658; *Assigned Car Cases,* 274 U. S. 564; *Oregon-Washington R. & Nav. Co.* v. *United States* 47 F. (2) 250. It follows, of course, that the remaining question is whether the findings provide adequate support for the order even though they do not negative the possibility that the merger will not be in accord with all the provisions of the antitrust statutes as they have been construed.

Considerable light will be thrown on this problem at once by noticing the plain fact that while the Antitrust Acts and the Interstate Commerce Act are designed to bring about the conduct of business for the common good the former are also penal and are aimed at the evils of monopolies as such which unreasonably restrain trade or business while the latter, though it does not disregard such evils, is primarily concerned with creation and maintenance of adequate transportation service to the public. Providing such adequate service comes, of course, within the realm of trade or business and it is self-evident that the consolida-

tion of the instrumentalities by which it is accomplished may create monopolies and consequent restraints which would be unreasonable, and therefore unlawful, if the antitrust laws are given paramount effect in every instance. We think it equally obvious that there may at times be at least an apparent conflict in the administration of these statutes. What will best serve the public interest by way of adequate transportation facilities may not leave the business so free from restraint due to monopoly that it can justly be said that such restraint would be unreasonable were elimination of that the primary objective. It may be that reasonableness is a term sufficiently elastic, since it is dependent upon all the relevant circumstances in each instance, that the proper satisfaction of the need for adequate public transportation service would in and of itself prevent what incidental restraint of trade flowed from it from being unreasonable. We need not so decide now on broad principles, however, for we think Congress has made it plain in sec. 5 (11) of the Interstate Commerce Act [49 U. S. C. A. § 58] that it recognized the inherent possibility that orders by the Commission made within its powers and in discharge of its duty to further the creation and maintenance of transportation facilities in the public interest under the Act might not always be outside the field of restraints made unlawful by the antitrust statutes as construed in respect to restraint of commerce per se.

Sec. 5 of Title 49 U. S. C. A. provides that:

The carriers affected by any order made under the foregoing provisions of this sec-

> tion and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the "antitrust laws," as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State, or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

The import of this is that the Commission, when acting with due regard for the public interest, which certainly requires it when passing upon proposed consolidations of carriers to give adequate consideration to such features as the maintenance of desirable competition and avoidance of hampering restraints, may, and should, be guided by the scope and purpose of the Interstate Commerce Act and that if, as it has in this instance, it has properly interpreted that statute and applied it correctly to the facts proved and found its order is valid. The provision that those who act in reliance upon and in conformity to such an order are not subject to the provisions of the antitrust laws designated, or to "other restraints or prohibitions by law" makes that conclusion inescapable.

That the Commission had the authority under the Interstate Commerce Act to enter the order it made on adequate evidence and in furtherance of the public interest cannot be doubted. Public interest is a proper standard in that it embraces in respect to public transportation service what is adequate, economical, efficient, necessary, and

therefore appropriate to serve the public need. *New York Securities Corp.* v. *United States,* 287 U. S. 12. Such changes in the Transportation Act of 1920 as were brought about by the Emergency Railroad Transportation Act of 1933 kept this standard of action fully applicable. *Texas* v. *United States,* 292 U. S. 522. The Motor Carrier Act of 1935 and the Transportation Act of 1940 applied like principles to the regulation of common carriers by motor vehicle.

What is needed for adequate service is a matter for the Commission to decide and it is likewise free to decide what amount of competition is in furtherance of the public interest and what is not. It is not bound to preserve or foster competition to a degree that will not best serve the public interest from the standpoint of adequate public transportation service and whether competition as such is adequate or not must depend upon its effect in furtherance of the attainment of the ends Congress sought to accomplish under the Interstate Commerce Act administered by the Commission.

Nor does the fact that, after this consolidation there will be no other one carrier by motor vehicle in competition with the applicant throughout the whole territory it serves prevent the making of the order. That is of course a factor to be considered, as it was, by the Commission in determining what is in the public interest just as are all the other pertinent factors and is to be given such weight in its final decision as the Commission, in its informed judgment and with due regard for all the evidence decides it should have. We can-

not review the weight of the evidence or the wisdom of the order. *New England Divisions Case*, 261 U. S. 184, 204.

The order authorizing the issuance of securities required to finance the consolidation was also based on adequate findings amply supported by the evidence. It follows that that order is likewise to be given effect.

Injunction denied and complaint dismissed.

HARRIE B. CHASE,
U. S. Circuit Judge.
WOOLSEY,
SAMUEL MANDELBAUM,
U. S. District Judges.

Dated Dec. 8, 1942.

United States District Court for the Southern District of New York

D Civil Action Nos. 18–116

McLEAN TRUCKING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

Before CHASE, C. J., and WOOLSEY and MANDELBAUM, D. JJ.

FINDING OF FACTS

1. This case was heard on the pleadings and on the record of the proceedings before the Interstate Commerce Commission; its findings and decision thereon.

2. The plaintiff is a common carrier by motor vehicle in competition with one or more of the defendant common carriers by motor vehicle in part of the territory involved.

3. The facts found and reported by the Commission were based on substantial evidence and are adopted as the facts by this court.

CONCLUSIONS OF LAW

1. The order approving the proposed consolidation was made by the Commission in accordance with the facts and the applicable law and is valid.

2. The order approving the proposed issuance of securities in furtherance of the consolidation was made by the Commission in accordance with the facts and the applicable law and is valid.

3. The injunction should be denied and the complaint dismissed.

HARRIE B. CHASE,
U. S. Circuit Judge.
WOOLSEY,
SAMUEL MANDELBAUM,
U. S. District Judges.

Dated Dec. 8, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1943